

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

ELIZABETH SINES, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Case No. 3:17-cv-00072-NKM
	:	
JASON KESSLER, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**MOTION TO SEAL MEMORANDUM IN SUPPORT OF  
MOTION FOR LEAVE TO WITHDRAW  
AND TO CONDUCT *EX PARTE* OR CLOSED HEARING RE SAME**

Pursuant to Local Rule 9, John A. DiNucci, counsel of record for Defendant Richard B. Spencer (Mr. Spencer), hereby moves this Court for entry of an order permitting him to file under seal his Memorandum in Support of Motion for Leave to Withdraw as Counsel for Defendant Richard B. Spencer (hereinafter the "Memorandum"),<sup>1</sup> to have the Court review the Memorandum *in camera*, to conduct any hearing thereon *ex parte* or to close it to the public, and keep its proceedings sealed.

In support thereof, counsel states as follows:

1. Rule 1.6, Rules of the Supreme Court of Virginia, prohibits an attorney from disclosing information that is "protected by the attorney-client privilege ... or other

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<sup>1</sup> Simultaneously with the electronic filing of this Motion, counsel is sending the subject Memorandum and a proposed order granting this Motion to the Clerk of Court in "conventional format" by Federal Express, pursuant to Local Rule 9 and Part N of the Court's Administrative Procedures for Filing, Signing and Verifying.

information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.”

2. American Bar Association (ABA) Formal Opinion 476 addresses the impact of Model Rule of Professional Responsibility (MRP) 1.6 on disclosure of privileged or confidential information in connection with motions to withdraw under MRP 1.16 (from which Rule 1.16, Rules of the Supreme Court of Virginia is drawn). In pertinent part, it states as follows:

If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it *and appropriate protective orders or other arrangements* should be sought by the lawyer to the fullest extent practicable. Thus Comment 16 [to Rule 1.6] anticipates the use of in camera submissions for disclosures where any of Rule 1.6(b)’s exceptions may apply.<sup>2</sup>

3. Or, as Assistant Virginia Bar Counsel Seth Guggenheim has stated:

ABA Formal Opinion 476 counsels lawyers to seek “to persuade the court to rule on the motion without requiring the disclosure of client confidential information, asserting all non-frivolous claims of confidentiality and privilege ...” However, if the court directs the lawyer to make disclosures which underpin his motion, or if it is evident to the

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<sup>2</sup> ABA Formal Opinion 476 at p. 8 (emphasis in original)(a copy of which is attached hereto). See also “Ethics Counsel – Thinking of Withdrawing? Think Again,” 66 *Virginia Lawyer* 16, 17 (2017) (a copy of which is attached hereto).

lawyer that to succeed he must rebut the client's or opposing counsel's contentions that the withdrawal motion must be denied, then the lawyer may make the otherwise-confidential disclosures ...<sup>3</sup>

4. Thus, if an attorney discloses in public the reasons for his motion to withdraw he is subject to sanctions by the bar. See *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001) (attorney licensed in District of Columbia and Virginia sanctioned by D.C. Bar because, in contravention of Virginia rule on confidentiality, he disclosed bases for motion to withdraw from litigation pending in Virginia).

5. There is no adequate alternative to sealing privileged or confidential information in this situation.

6. Counsel requests that the sealing be permanent or, alternatively, that it continue until the conclusion of this case (including any appeals).

7. Counsel also requests that any hearing on said Motion be conducted *in camera* and *ex parte* or, if not *ex parte*, that, in any event, any proceedings be closed to the public and be kept confidential.

8. There is good cause to grant this Motion.

**WHEREFORE**, the premises considered, John A. DiNucci requests the following relief:

- a. entry of an order that
  - (1) grants this Motion;

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<sup>3</sup> "Ethics Counsel – Thinking of Withdrawing? Think Again," 66 *Virginia Lawyer* at 17.

(2) orders that the Memorandum be sealed;

(3) orders that the Court's review of the Memorandum be *in camera*;

(4) orders that any hearing on said Motion be *ex parte* or, alternatively, that it be closed to the public, that the proceeding be kept confidential and that any recording or transcript thereof be sealed; and

b. an award of such other or further relief as this Court might deem just and proper.

Respectfully submitted,

/s/ John A. DiNucci  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 1, 2020, I filed the foregoing Motion with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to all counsel of record, including the following:

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I further certify, that on June 1, 2020, I also served the following non-ECF participants, by electronic mail, as follows:

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